IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5429

JIMMIE DALE THOMASON,

Petitioner,

vs.

JOHN H. SANCHEZ,
GOVERNMENT EMPLOYEES INSURANCE COMPANY and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

JIMMIE DALE THOMASON

vs.

JOHN H. SANCHEZ, et al.

PETITION FOR WRIT OF CERTIORARI

The petitioner Jimmie Dale Thomason, respectfully prays to this Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit, to review the Order and Judgment of that court, affirming the judgments of the United States District Court for the District of New Jersey filed August 27, 1975.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is reported as *Thomason v. Sanchez*, 398 F. Supp. 500 (D.N.J. 1975). (Appendix ~~C~~ B

The opinion of the United States Court of Appeals for the Third Circuit, is reported at F.2d (3d Cir. 1976), filed July 22, 1976. (Appendix ~~B~~ C)

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was issued on July 22, 1976. Jurisdiction of this Court is invoked under 28 *U.S.C.* §1254(1).

QUESTIONS PRESENTED

1. Is a soldier who is "on post" but "off duty," and is injured in a motor vehicle collision by a privately owned automobile driven by another soldier who is "on duty", precluded from recovery against both the United States and the individual soldier-driver (effectively precluding him from any tort recovery at all) under the *Federal Drivers Act*, 28 *U.S.C.* 2679(b)-(e) and this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950), interpreting the *Federal Tort Claims Act*, 28 *U.S.C.* 1346(b) and 28 *U.S.C.* Secs. 2671 *et seq.*?

2. Would not such a combination of holdings deny petitioner "due process of law"?

STATUTES INVOLVED

The Statutes involved are the *Federal Tort Claims Act*, 28 *U.S.C.* 1346(b) and 28 *U.S.C.* 2671 *et. seq.*, and the *Federal Drivers Act*, 28 *U.S.C.* 2679(b)-(e). The sections are set forth in Appendix A.

STATEMENT OF THE CASE

The situation giving rise to this suit occurred on November 30, 1972 when petitioner Jimmie Dale Thomason, a member of the United States Army stationed at Fort Dix, New Jersey, was struck by an automobile operated by defendant Sanchez, also a soldier stationed at Fort Dix, while petitioner was operating a motorcycle on base.

Suit was originally commenced in the Superior Court of New Jersey, Law Division, Burlington County, on behalf of Petitioner, who had sustained severe injuries, against defendant Sanchez, who was insured by Government Employees Insurance Co. (GEICO). GEICO answered (i.e. caused an answer to be filed), and subsequently alleged as a separate defense that petitioner's exclusive remedy was against the United States government, and that its policy did not apply because of an allegedly applicable exclusion.

Petitioner subsequently filed an administrative claim against the United States of America pursuant to the requirements of the *Federal Tort Claims Act* and instituted tort actions in the United States District Court for the District of New Jersey against defendants Sanchez and the United States of America. In addition, Petitioner instituted a suit for a declaratory judgment against those defendants and against GEICO, pursuant to 28 *U.S.C.* §2201, for a declaration of petitioner's rights, and a determination of the duties and liabilities of the several defendants therein named.

The above mentioned suits were consolidated by order of the District Court for the District of New Jersey.

Jurisdiction in that court was invoked under the *Federal Tort Claims Act*, §28 *U.S.C.* §§2671 *et seq.* and/or the *Federal Drivers Act*, 28 *U.S.C.* §2679(b)-(e). Jurisdic-

tion was further based on diversity of citizenship, petitioner being a citizen of Texas while defendant Sanchez is a resident of New Jersey and defendant GEICO is a corporation organized and existing under the laws of the District of Columbia.

That court, in a decision filed on August 27, 1975, reported at 398 F. Supp. 500, held that the *Federal Drivers Act*, 28 *U.S.C.* §2679(b)-(e), precluded recovery by the petitioner against defendants Sanchez and GEICO. The court further held that the decision of the United States Supreme Court, in *Feres v. United States*, 340 U.S. 135 (1950) prevented recovery against the United States.

Petitioner sought review of this decision in the Court of Appeals for the Third Circuit. That case was argued on May 3, 1976. On July 22, 1976 the court filed its opinion affirming the judgment of the District Court denying petitioner recovery.

REASONS FOR GRANTING THE WRIT

I.

This case involves an important question of construction of the *Federal Tort Claims Act*.

The large number of suits instituted by armed services personnel or their families to recover for injuries caused by an agent of the United States, demonstrates the importance of the issue presented to this Court for review. The decision of this Court in *Feres v. United States*, 340 U.S. 135 (1950) has not resolved this issue. Since that decision, almost one hundred cases have been instituted seeking to recover for injuries suffered by armed services personnel, and/or their families.[1]

1. *United States v. Brown*, 348 U.S. 110 (1954).
Camassar v. United States, 531 F.2d 1149 (2d Cir. 1976).
Hass v. United States, 518 F.2d 1138 (4th Cir. 1975).
Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 354.
Joseph v. United States, 505 F.2d 525 (1974).
Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974).
Beaucoudray v. United States, 490 F.2d 86 (7th Cir. 1974).
Herreman v. United States, 476 F.2d 234 (7th Cir. 1973).
Peluso v. United States, 474 F.2d 604 (3d Cir. 1973), *cert. denied*, 414 U.S. 879.
Henninger v. United States, 473 F.2d 814 (9th Cir. 1973), *cert. denied*, 414 U.S. 819.
DeFont v. United States, 453 F.2d 1239 (1st Cir. 1972), *cert. denied*, 407 U.S. 910.
Barr v. Brezine Construction Co., 461 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125.
Hall v. United States, 451 F.2d 353 (1st Cir. 1971).
Shaw v. United States, 448 F.2d 1240 (4th Cir. 1971).
Henning v. United States, 446 F.2d 774 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016.
Lowe v. United States, 440 F.2d 482 (5th Cir. 1971), *cert. denied*, 404 U.S. 833.
Shults v. United States, 421 F.2d 170 (5th Cir. 1969).
Hale v. United States, 416 F.2d 355 (6th Cir. 1969), *on remand*, 334 F. Supp. 566 (D. Tenn.) *affirmed*, 452 F.2d 668 (6th Cir. 1971).

There is no reason to believe that this quality of litigation will decrease with time. On the contrary, an exam-

Mattos v. United States, 412 F.2d 793 (9th Cir. 1969).
Coyne v. United States, 411 F.2d 987 (5th Cir. 1969).
Gerardi v. United States, 408 F.2d 492 (9th Cir. 1969).
United States v. Lee, 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053.
Buckingham v. United States, 394 F.2d 483 (4th Cir. 1968).
Dilworth v. United States, 387 F.2d 590 (3d Cir. 1967).
Maddux v. Cox, 382 F.2d 119 (8th Cir. 1967).
United States v. Carroll, 369 F.2d 618 (8th Cir. 1966).
Sheppard v. United States, 369 F.2d 272 (3d Cir. 1966), *cert. denied*, 380 U.S. 982.
Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966), *cert. denied*, 387 U.S. 917.
Chambers v. United States, 357 F.2d 224 (8th Cir. 1966).
United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951.
Knoch v. United States, 316 F.2d 532 (9th Cir. 1963).
Hungerford v. United States, 307 F.2d 99 (9th Cir. 1961).
Ulmer v. Hartford Accident & Indemnity Co., 300 F.2d 549 (5th Cir. 1959).
Layne v. United States, 295 F.2d 433 (7th Cir. 1961), *cert. denied*, 368 U.S. 990.
Callaway v. Garber, 289 F.2d 171 (9th Cir. 1961), *cert. denied*, 368 U.S. 874.
Jones v. United States, 249 F.2d 864 (7th Cir. 1958).
Knetch v. United States, 242 F.2d 929 (3d Cir. 1957).
Buer v. United States, 241 F.2d (7th Cir. 1957), *cert. denied*, 353 U.S. 974.
Orken v. United States, 239 F.2d 850 (6th Cir. 1957).
United States v. United Auto Services Association, 238 F.2d 364 (8th Cir. 1957).
Moos v. United States, 225 F.2d 705 (8th Cir. 1955).
Preferred Insurance Co. v. United States, 222 F.2d 942 (9th Cir. 1955), *cert. denied*, 350 U.S. 837, *rehearing denied*, 351 U.S. 990.
Archer v. United States, 217 F.2d 548 (9th Cir. 1955), *cert. denied*, 348 U.S. 953.
Zoula v. United States, 217 F.2d 81 (5th Cir. 1955).
O'Brien v. United States, 192 F.2d 948 (8th Cir. 1952).
Alexander v. United States, 500 F.2d 1 (8th Cir. 1974), *cert. denied*, 419 U.S. 7107 (1975).
Bradshaw v. United States, 443 F.2d 759 (D.C. Cir. 1971).
Martin v. United States, 404 F. Supp. 1240 (Pa 1975).
Southard v. United States, 397 F. Supp. 409 (Pa. 1975).

ination of the cases dealing with this issue demonstrates that litigation on this issue is as extensive now as it was at

Donham v. United States, 395 F. Supp. 52 (Mo. 1975).
Adams v. General Dynamics Corp., 385 F. Supp. 890 (Cal. 1974).
McCord v. United States, 377 F. Supp. 953 (Tenn. 1972), *affirmed*, 477 F.2d 599.
Frazier v. United States, 372 F. Supp. 208 (Fla. 1973).
Morgan v. United States, 366 F. Supp. 938 (Fla. 1973).
Rotko v. Abrams, 338 F. Supp. 46 (Conn. 1971), *affirmed*, 455 F.2d 992.
Redmond v. United States, 331 F. Supp. 1222 (Ill. 1971).
Glorioso v. United States, 331 F. Supp. 1 (Miss. 1971).
Rivera-Grau v. United States, 324 F. Supp. 394 (N.M. 1971).
Petition of United States, 303 F. Supp. 1282 (N.C. 1969), *affirmed*, 432 F.2d 1357.
Coletta v. United States, 300 F. Supp. 19 (R.I. 1969).
Kuhne v. United States, 267 F. Supp. 49 (Tenn. 1967).
Watt v. United States, 264 F. Supp. 386 (N.Y. 1965).
Hand v. United States, 260 F. Supp. 38 (Ga. 1966).
Downes v. United States, 249 F. Supp. 626 (N.C. 1965).
Kilduff v. United States, 248 F. Supp. 318 (Va. 1965).
Bailey v. DeQuevedo, 241 F. Supp. 335 (Pa. 1965), *affirmed*, 375 F.2d 72.
Gursley v. United States, 232 F. Supp. 614 (Cal. 1964).
Garner v. Rathburn, 232 F. Supp. 598 Col. 1964), *affirmed*, 346 F.2d 55.
Degentesh v. United States, 230 F. Supp. 763 (Ill. 1964).
Schwartz v. United States, 230 F. Supp. 536 (Pa. 1964).
Richardson v. United States, 226 F. Supp. 49 (Va. 1964).
Small v. United States, 219 F. Supp. 659 (Del. 1963), *affirmed*, 333 F.2d 702.
Gamage v. United States, 217 F. Supp. 381 (Cal. 1962).
Pratt v. United States, 207 F. Supp. 138 (Mass. 1962).
Harris v. United States, 204 F. Supp. 228 (Mass. 1962), *affirmed*, 308 F.2d 573.
Homlitas v. United States, 202 F. Supp. 520 (Ore. 1962).
Healy v. United States, 192 F. Supp. 325 (N.Y. 1961), *affirmed*, 295 F.2d 958.
Fass v. United States, 191 F. Supp. 367 (N.Y. 1961).
Holcolmbe v. United States, 176 F. Supp. 297 (Va. 1959), *affirmed*, 277 F.2d 143.
United States v. The Washington, 172 F. Supp. 905 (Va. 1959), *affirmed, United States v. Texas*, 272 F.2d 711.
Drumgoole v. Va. Electric & Power Co., 170 F. Supp. 824 (Va. 1959).
Sapp v. United States, 153 F. Supp. 496 (La. 1957).
Rich v. United States, 144 F. Supp. 791 (Pa. 1956).

the time of the Court's decision in *Feres*. Indeed, in view of later cases which may be seen as modifying the *Feres* decision[2] and in view of the dissatisfaction expressed by lower courts[3] the litigation in this area can only be expected to increase. Therefore, it is respectfully requested that this Court grant certiorari to re-examine *Feres*. This Court has the power to overrule it, and/or to modify it in light of modern conditions, or at least to clarify the "incident to service" exclusion promulgated by the Court in that decision.

Norris v. United States, 137 F. Supp. 11 (N.Y. 1956), *affirmed*, 229 F.2d 439.

Wallis v. United States, 126 F. Supp. 673 (N.C. 1955).

Rufino v. United States, 126 F. Supp. 132 (N.Y. 1955).

Rosen v. United States, 126 F. Supp. 13 (N.Y. 1955).

Ritzman v. Trent, 125 F. Supp. 664 (N.C. 1955).

Snyder v. United States, 118 F. Supp. 585 (Md. 1953), *mod.*, 218 F.2d 266, *reversed*, 350 U.S. 906.

Pettis v. United States, 108 F. Supp. 500 (Cal. 1953).

Brown v. United States, 99 F. Supp. 685 (W. Va. 1951).

Herring v. United States, 98 F. Supp. 69 (Col. 1951).

Knight v. United States, 361 F. Supp. 708 (Tenn. 1973), *affirmed*, 480 F.2d 927.

James v. United States, 358 F. Supp. 1381 (R.I. 1973), *vacated and remanded*, 502 F.2d 1159.

Schwager v. United States, 326 F. Supp. 1081 (Pa. 1971).

Keisel v. Buckeye Donkey Bell, Inc., 311 F. Supp. 370 (Va. 1970).

United Service Auto Association v. United States, 285 F. Supp. 854 (N.Y. 1968).

Barnes v. United States, 103 F. Supp. 5 (Ky. 1952).

2. *United States v. Muniz*, 374 U.S. 150 (1963); *United States v. Brown*, 318 U.S. 110 (1954), discussed more fully in Point III, below.

3. *Peluso v. United States*, 474 F.2d 605 (3d Cir. 1973), *cert. denied*, 414 U.S. 879 (1973); *James v. United States*, 358 F. Supp. 1381 (D. R.I. 1973) *vacated*, 502 F.2d 1159 (1st Cir. 1973). In fact, in the present case, the District Court while following *Feres*, did so reluctantly. The Court of Appeals, while also following *Feres*, reiterated the doubts expressed in *Peluso*, as to whether or not the *Feres* decision was of continuing validity. Such expressions of discontent by the lower federal courts are certain to encourage even greater litigation in the future.

II.

The decision of the Third Circuit Court of Appeals is inconsistent with the principles implicit in prior decisions of this Court.

Although the *Feres* decision enunciated an exclusion to the *Federal Tort Claims Act* denying recovery to servicemen for injuries received "incident to their service," that decision did not define the scope of that exception. Later cases, which have explained the rationale of that decision, require the conclusion that the Third Circuit has adopted a test which unjustifiably enlarges this decision.

Prior decisions of this Court require that any exceptions added to the *Federal Tort Claims Act* be applied in a restrictive manner. In *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949), the Court quoted Judge Cardozo's statement in *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 153 N.E. 28, 29-30 (1926):

> The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.

See also *Yellow Cab Co. v. United States*, 340 U.S. 543 (1950).

In view of the principles stated above, the decision of the Third Circuit has enlarged the scope of the exclusion for injuries incurred "incident to service" beyond the meaning of the term as used in *Feres v. United States, supra*. The true basis of the *Feres* decision has been said to be the

> peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that

> might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . .

United States v. Muniz, 374 U.S. 150, 162 (1963); *United States v. Brown*, 348 U.S. 110, 112 (1954). Recognizing this as the true scope of the exclusion, it is respectfully submitted that the issue to which the Third Circuit should have addressed itself is whether the action brought by petitioner is one which will adversely affect military discipline or the order of military command.

The importance of this question is demonstrated by the large number of cases which have questioned the scope of the "incident to service" exclusion and the number of decisions which have been rendered contrary to the above-stated principles. The very persistence of these cases, in the face of repeated refusal of the courts to allow such claims, demonstrates that the broad application of *Feres* is contrary to the established principles of this Court. Such persistence can only be explained by viewing these litigants as recognizing that the broad application of *Feres* is an anomaly in our judicial system, and therefore believing that this error will soon be corrected.

It is therefore respectfully requested that the Court review the decision of the Third Circuit to establish the correct criteria for whether an injury to a serviceman is incurred "incident to his service" as that language is used in the *Feres* decision.

III.

The Court should re-examine the decision in *Feres* because that case is inconsistent with principles previously enunciated by the Court which preclude reading into the Act an exception for injuries received by servicemen.

It has been established by previous decisions of this Court that a statute which is clear and unambiguous may not be modified or qualified by the Court. *Bruner v. United States*, 343 U.S. 112 (1952); *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98 (1937):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law making body which passed it, the sole function of the courts is to enforce it according to its terms.

Caminetti v. United States, 242 U.S. 470, 485 (1916).

The *Federal Tort Claims Act* is clear and unambiguous. This was stated by the Court in *Brooks v. United States*, 337 U.S. 49, 51 (1949):

> The statute's terms are clear. They provide for District Court jurisdiction over *any claim founded on negligence brought against the United States. We are not persuaded that "any claim" means "any claim but that of servicemen."* The statute does contain twelve exceptions. §421, 28 USCA §943; now 28 USC 1948 ed §2680. None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term "any claim." It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

The Court in *Feres* admitted that the Act contained no language to justify excluding claims for injuries to servicemen, but added the exception under the guise of "construction." This approach is inconsistent with other decisions of this Court, both prior and subsequent to *Feres*, which disapprove narrowing the scope of the Act by construction. As the court stated in *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949):

> In argument before a number of District Courts and Courts of Appeals, the government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

Recognizing the implications of Congress having delineated eight exceptions to the Act, the Court has consistently refused to add others:

> Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well-defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge the exceptions.

Yellow Cab Co. v. United States, 340 U.S. 543, 548-9 (1950).

In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the United States Supreme Court again refused to read into the Act an exception not created by Congress.

This principle was reaffirmed in *Rayonier v. United States*, 352 U.S. 315, 320 (1957) and in *United States v. Muniz*, 374 U.S. 150, 166 (1963):

> There is no justification for this Court to read exemptions into the [Tort Claims] Act beyond those provided by Congress. If the Act is to be altered, that is a function for the same body that adopted it.

The *Feres* decision is in conflict with the above-stated principles previously enunciated by the Court. This conflict cannot be justified by reference to the purpose of the Act or the legislative history. In other cases in which this Court has considered the purpose of this Act, it has refused to add exclusions to those set forth by Congress in 28 *U.S.C.* 2680(a)-(n). See *Yellow Cab v. United States, supra*, at 550.

An examination of the purpose of this Act led this Court to a similar conclusion in *Rayonier v. United States, supra* at 319:

> It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its fire-fighting but the very purpose of the Tort Claims Act was to waive the government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

The *Feres* Court's construction is not justified by the legislative history of the Act. As this Court pointed out in *Brooks v. United States, supra*, several of the tort claim bills contained an exclusion denying recovery to members of the armed forces. The Court recognized the omission of the exception in the final act as indicative of Congressional intent to allow recovery:

> When H.P. 181 was incorporated into the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared.

337 U.S. 52.

In view of the conflict between *Feres* and the above-cited decisions of this Court, the *Feres* decision should be reviewed to resolve these inconsistencies.

IV.

The decision in *Feres* should be reviewed because later decisions of this Court have undermined the reasoning upon which *Feres* is based.

In *Feres v. United States, supra,* the Court agreed that there was nothing in the language of the Act to warrant denying recovery to servicemen, but construed the Act to exclude claims by military personnel for injuries incurred "incident to their service." The asserted bases of this decision were enumerated in *United States v. Muniz, supra.*

The validity of the Court's reasoning is brought into doubt by the decision in *United States v. Brown, supra.* In that case, the Court correctly recognized that the issue was not whether or not the relationship of the government to the claimant was unique, but whether the act alleged to be negligent would be cognizable under state law. To the extent that the United States had previously been immune from tort claims, *any* claim is novel and unprecedented. It is respectfully submitted that the *Feres* court misinterpreted the language of the Act, and that this error is recognized, and rejected in *Indian Towing, Rayonier and Muniz.* While the court in *Brown* does not appear to recognize the inconsistency between its interpretation and that in *Feres,* the decision in *Brown* illustrates that the issues the *Feres* Court should have focused upon were not those associated with

the relationship of the government to its soldiers, but rather that of a landlord to its tenant (in the *Feres* claim) and that of a hospital to its patients (in *United States v. Griggs,* and *Jefferson v. United States,* the companion cases to *Feres v. United States*).

Brown and *Muniz* also cast doubt upon the validity of the *Feres* Court's reliance on the existence of a compensation system, if in fact that reasoning ever was valid in view of the allowance of claims for servicemen which are *not* incurred "incident to service".

In fact, the Court in the *Brown* and *Muniz* decisions, suggested that the real basis of *Feres,* is the

> peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. . . .

United States v. Muniz, supra at 162; *United States v. Brown, supra* at 112. The Court in *Muniz* refused to accept this reasoning with regard to prisoners. (Should this Court treat members of the military service with any the less regard?) The Court rejected the Government's argument that litigation will damage prison discipline by noting the lack of evidence on this point.

This reasoning, leading the court to allow recovery by federal prisoners, is equally applicable to military personnel. It is therefore respectfully submitted that the decision of this court in *Feres v. United States, supra,* should be reexamined in light of the inconsistency between that case and the above-cited cases subsequently decided by this Court.

V.

The avalanche of criticism of *Feres* by lower Courts and legal writers is highly indicative that *Feres* should be reviewed again, after a quarter century, by this Court.

The *Feres* decision has created much confusion and unfairness concerning the meaning of the words "incident to service." The opinions below, in both the District Court and the Court of Appeals for the Third Circuit, illustrate amply the dissatisfaction of well-regarded Federal judges with what they obviously consider the restrictions of *stare decisis* of previous decisions flowing from *Feres*. The appellate decision below noted that Judge Fisher had "reluctantly" granted summary judgment in favor of the defendants. A reading of the Third Circuit opinion seems to carry on that reluctance, and even to suggest, if not invite, Petitioner to bring this unfair state of events to the attention of this Court:

> "(Thomason) concedes that 'it seems that the *Feres* line of decisions is too firmly entrenched to be dislodged at this time.' . . . We previously expressed reservations about the continuing validity of the broad *Feres* doctrine. *Peluso v. United States*, 474 F.2d 605 (3d Cir.) (per curiam), *cert. den.*, 414 U.S. 879 (1973) (three Justices voting to grant certiorari). Upon reconsideration we reiterate that concern; as we noted there, however, we are powerless to jettison *Feres* or to dislodge it sufficiently to create an exception for vehicular collisions involving servicemen. *See ibid.* at 606." Opinions, pp4-5.

and:

> "Rather it is the effect of the *Feres* doctrine—which turns on plaintiff's status—which produces the hardship in this case. And, as we have stated previously, only the Supreme Court can overrule, or modify, *Feres*. *Pelusc v. United States, supra*, 474 F.2d at 606." Opinion, p. 10.

See also Captain Rhodes' article in The Air Force Law Review/Spring 1976, at p. 24, "The Feres Doctrine After Twenty-Five Years."

While this Court cannot, of course, be persuaded because of the dissatisfaction of a myriad of Federal judges of the unfairness and restrictiveness of the *Feres* doctrine, it is certainly a factor to be considered in a decision as to whether to grant certiorari.

VI.

The deprivation of allowance of any tort recovery to Petitioner denies him "due process of law".

Admittedly, the opinion of the Third Circuit, below, felt that the opinion in *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970), was a satisfactory disposition of the "due process" argument. Respectfully, Petitioner vigorously disagrees. As District Judge Fisher noted in his opinion, below:

> "Although the due process argument has been recognized previously, it has not been effectively dealt with before in circumstances *similar to the facts herein.*" (Emphasis added) Opinion, pp 7-8.

Carr dealt with civilian employees of the federal government. And in the other two cases allegedly cited in regard to the "due process" issue, *Van Houten v. Ralls*, 411 F.2d 940 (9th Cir. 1969), *reh. den.* 1969, and *Noga v. United States*, 411 F.2d 943 (9th Cir. 1969), a careful reading and comparison (of the three cases) shows that the "due process" argument, in circumstances as are here applicable, has *never* previously received a federal court's attention.

The Third Circuit opinion below notes that the *Federal Drivers Act* is predicated upon *defendant's* status (emphasis

in original opinion (p. 27a). But it undeniably affects plaintiff's rights (as the opinion recognizes): what if, for example, Sgt. Sanchez had been so busy that he had called Mrs. Sanchez to go on the errand he was pursuing at the time of the accident; or he had left his duty assignment early that evening to visit a sick friend? Can rights of an individual, and the disbursal of justice with due process of the law, be said to rest on such happenstance?

CONCLUSION

For the reason stated above, and for the interests of justice in this case, this Court should reexamine the *Feres* doctrine and reform or clarify it in light of other interpretations and the plain meaning of the *Federal Tort Claims Act;* in addition, this Court should reconcile and interpret the apparent conflict between the provisions of the *Federal Drivers Act* and the *Federal Tort Claims Act* which have led both District Court and Circuit Court of Appeals reluctantly to deny Petitioner any right of recovery whatever.

Respectfully submitted,

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By: /s/ Ira Rabkin
IRA RABKIN

CERTIFICATION OF SERVICE

I hereby certify that timely service of three (3) copies of the within Petition for Writ of Certiorari have been made upon each of the following: Roy Cummins, Esq., Attorney for Respondents John H. Sanchez and Government Employees Insurance Company, 504 Cooper Parkway Building, Pennsauken, New Jersey 08109; Jonathan L. Goldstein, United States Attorney, 970 Broad Street, Newark, New Jersey 07102, Attention: Maryanne T. Desmond, Esq., Assistant United States Attorney; and Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served by the Rules of this Court have been served.

MOLOTSKY, RABKIN & GROSS
A Professional Corporation
Attorneys for Petitioner
132 Kings Highway East
Haddonfield, New Jersey 08033

By: /s/ Ira Rabkin
IRA RABKIN

APPENDIX A

28 § 1346 DISTRICT COURTS; JURISDICTION
Part 4

§ 1346. United States as defendant

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

28 § 2679 JUDICIARY—PROCEDURE

§2679. Exclusiveness of remedy

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed

a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect. June 25, 1948, c. 646, 62 Stat. 984; Sept. 21, 1961, Pub.L. 87-258, §1, 75 Stat. 539.

APPENDIX B

OPINION

APPEARANCES:

MOLOTSKY, RABKIN & GROSS,
By: Ira Rabkin, Esquire,
For the Plaintiff

ROY D. CUMMINS, ESQUIRE,
For Defendants Sanchez and Government Employees Insurance Company (GEICO)

JONATHAN L. GOLDSTEIN, ESQUIRE,
United States Attorney,
By: Maryanne T. Desmond, Esq.,
Asst. U.S. Attorney,
For the United States of America

FISHER, District Judge

This action involves a multiplicity of suits, most of which have now been consolidated, based on identical factual contentions.

Civil 74-1831 is an action for declaratory judgment brought pursuant to 28 U.S.C.A. §2201, in which the named defendants are John Sanchez, Government Employees Insurance Company (hereinafter "GEICO") and the United States of America. Jurisdiction is invoked under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §2671 *et seq.* and/or the Federal Drivers Act, 28 U.S.C.A. §2679(b)-(e). Jurisdiction is further based on diversity of citizenship, plaintiff being a citizen of Texas while defendant Sanchez is a resident of New Jersey and defendant GEICO is a corporation organized and existing under the laws of the District of Columbia.

Civil 74-1832, an action in tort for damages, was filed by plaintiff on November 21, 1974 against Sanchez and the United States. In view of the fact that the suit was prematurely brought against the United States prior to the lapse of a six month period between the time of filing the administrative claim of July 9, 1974 and the time of filing this action, plaintiff, upon learning of this defect, immediately commenced Civil 75-408, alleging the exact contentions as those claimed in Civil 74-1832. This action was taken in order to enable the plaintiff to obtain jurisdiction over defendant Sanchez in Civil 74-1832 and over defendant United States in Civil 75-408, pursuant to a consent order executed by the parties on April 28, 1975, in which defendant United States was dismissed in Civil 74-1832 only and defendant Sanchez was dismissed in Civil 74-408 only.

The final suit brought in this matter is Civil 75-840. This tort action, involving the same factual contentions as those in the above discussed suits, was originally instituted in Superior Court, Law Division, Burlington County and has now been removed to this Court, pursuant to 28 U.S.C.A. §2679(d), on certification by the Attorney General that defendant Sanchez was acting within the scope of his employment. A motion to dismiss has been filed in this action by defendant Sanchez. However, at the request of counsel, the Court has withheld decision on such motion until disposition of the declaratory judgment action. These latter three suits, 74-1832, 75-408 and 75-840, have now been consolidated by consent order of May 27, 1975.

Plaintiff, a member of the United States Army stationed at Fort Dix, N.J., was operating a motorcycle on the base on November 30, 1972. While not within his "duty hours," he was struck by an automobile operated by defendant Sanchez, who was then performing his assigned tasks as a

member of the Army. Sanchez was covered by an automobile insurance policy issued by defendant GEICO.

There are cross-motions for summary judgment before the Court brought by plaintiff and the United States in the declaratory judgment suit. Plaintiff avers therein that the FTCA purportedly holds that a member of the armed forces on the military post to which he is assigned, while not in the performance of his duties, may not invoke the FTCA. The effect of this contention is to deny plaintiff a remedy against the United States. Further, the provisions of the FDA provide that an individual injured by the alleged negligence of an employee of the Federal Government who was acting within the scope of his employment at the time of the accident may not sue the alleged tortfeasor individually, but may only bring suit against the United States. Plaintiff, therefore, asks this Court to resolve the apparent conflict between these federal statutes which appear to preclude him from recovery. He seeks a declaration that he cannot be deprived of his common law and constitutional rights to bring suit and to receive full and just compensation for his injuries.

Under the long-established doctrine of sovereign immunity, a governmental body cannot be sued unless it expressly waives its right to immunity from suit. However, with the enactment of the Federal Tort Claims Act, the United States Government did, in fact, waive its immunity by rendering itself liable for tort claims, "in the same manner and to the same extent as a private individual under like circumstances . . .," 28 U.S.C.A. §2674. In the leading case of *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court stated:

> "The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Id.* at 139.

The initial decision in determining whether recovery is allowed under the FTCA for personal injuries to or the death of a serviceman was decided in the affirmative in *Brooks v. United States*, 337 U.S. 49 (1949). In *Brooks*, two servicemen were riding in an automobile on a public highway when their vehicle was struck by an Army truck, resulting in death to one and injuries to the other. It was held that servicemen were not precluded from relief under the Act provided that the injuries on which the claim was based were not incident to their service. "Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it . . . ." *Id.* at 52.

However, one year later, the United States Supreme Court was faced with the "incident to service" issue in *Feres, supra*. That opinion involves three cases which were consolidated in view of the common underlying fact that in each instance, recovery was sought for injuries sustained by a serviceman while on active duty and not on furlough or pass, which resulted from the negligence of another member of the Armed Forces. In *Feres*, claimant sought recovery for the death of an officer who perished in a fire while sleeping in allegedly unsafe barracks. The *Jefferson* and *Griggs* cases involved claims based on medical malpractice.

The Supreme Court, in denying governmental liability, distinguished *Brooks, supra* on the basis that "Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders." 340 U.S. at 146. Here, the court concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are

in the course of activity *incident to service.*" (emphasis added). *Id.*

It is the phrase "incident to service" which, in its increasingly broad construction by the courts, has led to a great deal of difficulty. In *Ritzman v. Trent,* 125 F. Supp. 664 (E.D.N.C. 1954), the court denied a soldier's claim for recovery under the FTCA for injuries sustained when his automobile was struck by a vehicle which had in turn been struck by a United States vehicle. Plaintiff was a member of the Army stationed at Fort Bragg who, at the time of the accident, was not on leave or furlough. Rather, he was on the base engaged in repairing a private automobile, with his activity in no way related to the performance of any military duty. In spite of these circumstances, the court denied recovery, holding that his injuries were incident to service.

> ". . . as much so as the death of the serviceman in the *Feres* case, who was asleep in his barracks at the time of the fatal fire. While plaintiff here had been relieved of specific duty during the balance of the day on which he was hurt, so the decedent in the *Feres* case had been relieved of specific duty during the night on which he was burned to death in his barracks. In both cases the soldier was on active duty in the service of the United States, and of course, at the time, was subject to call for military duty." 125 F. Supp. at 665.

The Court of Appeals for the Eighth Circuit more recently has held that the plaintiff, a military reservist traveling in uniform to a weekend drill, was engaged in "activity incident to military service" and thereby precluded from recovery under the FTCA for injuries sustained as a result of the crash of the military aircraft in which he was a passenger, although plaintiff had the option of traveling by

whatever means he chose and was not acting under orders at the time of the accident. *United States v. Carroll,* 369 F.2d 618 (8th Cir. 1966). The Court of Appeals for the Third Circuit, as well, in a per curiam decision, has upheld the continued viability of the *Feres* doctrine. *Peluso v. United States,* 474 F.2d 605, (3d Cir. 1973), *cert. denied,* 414 U.S. 879 (1973).

The *Peluso* action was brought pursuant to the FTCA, as a survival action by the administrator and a wrongful death action by the parents of decedent, a member of the New Hampshire National Guard who died while on active duty with the United States Army at Fort Dix, N.J. During his service at that post, he allegedly received negligent treatment for an abdominal condition which resulted in his death. The Court of Appeals for the Third Circuit, although expressing its reluctance to adhere to *Feres,* deemed the case controlling until such time that the Supreme Court alters the principle or Congressional action remedies the results of the doctrine.

> "The rationale of *Feres* was (1) that the relationship between a soldier and the United States was distinctly federal, while the Federal Tort Claims Act referred, for governing law, to the place where the act or omission occurred, and (2) that there was a federally funded care and compensation system for military personnel. For these reasons the (Supreme) Court concluded that (the) Federal Tort Claims Act should not be construed to apply to armed services personnel for injuries not only in the course of but also arising out of activity incident to service." *Id.* at 606.

The Court went further in stating its disenchantment with *Feres.* "If the matter were open to us we would be receptive to appellants' argument that *Feres* should be re-

considered, and perhaps restricted to injuries occurring directly in the course of service. But the case is controlling." *Id.* cf. Sheppard v. United States, 369 F.2d 272, (3d Cir. 1966); *Bailey v. DeQuevedo,* 375 F.2d 72, (3d Cir. 1967).

The fact that Thomason was in a "present for duty" status and not on any type of leave or pass, as sworn to in an affidavit by Captain James A. Kerchman, Commander of the Medical Company at Fort Dix, brings plaintiff within the ambit of *Feres,* thereby negating the applicability of the FTCA. However, in view of the fact that he was in a line of duty status at the time his injuries were incurred, Thomason became eligible for the benefits accruing to a member of the United States Army.

The liability of GEICO as the insurer of defendant Sanchez must also be examined. In the state court proceedings, which have now be removed pursuant to 28 U.S.C.A. §2679(d), counsel for GEICO referred to Exclusion K of the insured's policy, which states as follows:

"Exclusions—The policy does not apply under Part I (Liability)

(K) to the following as insureds

(1) the United States of America or any of its agencies, or

(2) any person, including the named insured, if protection is afforded such person under the provisions of the Federal Tort Claims Act."

Under existing case law, however, this section is inapplicable as protection is, in fact, not afforded by the FTCA. Therefore, it would appear that plaintiff should be able to assert his claim solely against the individual tortfeasor, Sanchez and his insurer. Yet can he actually make such a claim against the defendants?

By enactment of the Federal Drivers Act, Congress sought to protect the individual federal employee from personal tort liability. This was accomplished by designating suit against the United States under the FTCA the exclusive remedy for damages sustained as a result of negligent operation of a motor vehicle by a federal employee acting within the scope of his employment. 28 U.S.C.A. §2679 (b). See Annotation in 16 A.L.R. 3d 1394. In order, however, to claim the benefit of this exclusiveness of remedy against the government, the individual defendant must have been acting within the scope of his employment and must receive certification thereto from the Attorney General, pursuant to 28 U.S.C.A. §2679(d), which provides as follows:

> (d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

Yet, the previous discussion leaves little doubt that under the *Feres* decision, remedy against the United States under the FTCA does not, in fact, exist as Thomason's duties must be construed as having been incident to service. There

must be an independent determination by the court, then, as to whether Sanchez was acting within the scope of his employment, so as to preclude recovery from him individually.

The facts reveal that at the time of the collision Sanchez was operating his own vehicle, returning from procuring change for the use of Annex #1 of the Non-Commissioned Officers' Club at Fort Dix, N.J., of which he was in charge. This finding is substantiated by affidavit of Sanchez of April 3, 1975 indicating that he was within the scope of his employment.

A verified petition for removal has been executed by Maryanne T. Desmond, Assistant United States Attorney, which certifies that defendant John Sanchez was acting within the scope of his employment at the time of the incident out of which the within suit arose. The concomitant result of this petition is to provide an exclusive remedy against the United States for personal injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C.A. §2679(b).

Can plaintiff be left, then, with no remedy against Sanchez, GEICO and the United States and thereby be deprived of his constitutional right to due process?

Although the due process argument has been recognized previously, it has not been effectively dealt with before in circumstances similar to the facts herein. The Fourth Circuit Court of Appeals has, however, held that the provision of the Federal Drivers Act abrogating a federal employee's common-law right of action for negligence against a government driver acting within the scope of his employment was not unconstitutional. *Carr v. United States*, 422 F.2d

1007 (4th Cir. 1970). That case arose out of an automobile collision between a vehicle operated by Robert D. Mitchell and another automobile. At the time of the accident both Carr and Mitchell were federal employees acting within the scope of their employment.

The court stated that through the exclusivity of remedy provision in 28 U.S.C.A. §2679(b), ". . . abrogation is well within the ambit of the statutory language." *Id.* at 1010.

> "Any other result would undermine the Act's purpose to protect government drivers from all liability. We, therefore, agree with the holdings of other circuits that the Driver's Act abrogates a federal employee's common law right of action against a government driver who is acting within the scope of his employment. *Van Houten v. Ralls*, 411 F.2d 940 (9th Cir. 1969); *Gilliam v. United States*, 407 F.2d 818 (6th Cir. 1969); *Vantrease v. United States*, 400 F.2d 853 (6th Cir. 1968)." *Id.*

Carr went further, as plaintiff does here, urging that abrogation without the creation of some new benefit as a *quid pro quo* constitutes a violation of the due process clause of the fifth amendment. This argument was rejected as unsound by the court, citing *Silver v. Silver*, 280 U.S. 117 (1929), wherein it was held that:

> ". . . the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law . . . ." *Id.* at 122.

Following this line of reasoning, the Supreme Court has consistently held that where Congress has provided a form of administrative compensation for Government employees injured while in the performance of their duties, the availability of such a remedy precludes recourse to tort claims

against the Government. This very point was discussed by the court in *Feres, supra,* where it was found relevant, in the denial of plaintiffs' claims under the FTCA for injuries incident to service, that Congress has provided "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." 340 U.S. at 144. The Court of Appeals for the Ninth Circuit, on the basis of *Feres,* dismissed a suit brought under the Federal Drivers Act, in which decedent's parents sought to recover for their son's death, which occurred when the military truck in which he was riding overturned. *Mattos v. United States,* 412 F.2d 793 (9th Cir. 1969).

> "As in *Feres,* the availability of compensation for injuries incurred in military service renders . . . (judicial) intrusion unnecessary." *Id.* at 794.

This proposition has been followed in precluding government liability under a particular statute where there exists an exclusive, or even an alternative, form of administrative compensation for federal employees injured while within the scope of their employment. The Court of Appeals for the Ninth Circuit held that a federal employee injured while riding as a passenger in a vehicle being driven by another federal employee who was within the scope of his employment at the time and collided with another vehicle being driven by a federal employee also within the performance of his duties, had as his sole remedy the benefits accruing to him under the Federal Employees' Compensation Act. *Van Houten v. Ralls,* 411 F.2d 940 (9th Cir. 1969), *reh. denied* 1969.

> "The federal legislative objective in enacting the Federal Drivers Act while leaving the exclusivity provision of the FECA intact was apparently to protect federal drivers from personal liability by rendering the Government liable in tort, in the case of non-federal employee plaintiffs, and by rendering the Government liable only under the FECA in the case of federal employee plaintiffs." *Id.* at 943.

There was no issue of due process raised in the litigation. However, in a case decided the same day by the Ninth Circuit Court of Appeals, as well, the court recognized the problem but again avoided confronting it in an action by a federal employee brought against the United States under the FTCA for personal injuries sustained in an automobile accident allegedly negligently caused by another federal employee. *Noga v. United States,* 411 F.2d 943 (9th Cir. 1969).

> "In this case plaintiff Noga sued only the United States. There has never been a common law right by an injured person, Government employee or otherwise, to recover damages from the United States by reason of the negligence of a Government employee. Therefore, neither the Federal Drivers Act nor the FECA deprived plaintiff of a pre-existing common law remedy against the Government. Whether the Federal Drivers Act, in insulating federal drivers from a pre-existing common law right of action for damages brought by a fellow employee, constitutes a deprivation of due process, is a question not presented here since Noga did not sue the driver." *Id.* at 945.

Yet, as previously discussed, the due process argument was dealt with in *Carr v. United States, supra.* Plaintiff therein did have a remedy under the FDA, but sought a remedy which he preferred—that of suing the individual driver. The case before this court denies plaintiff of the remedy of suing the individual driver in view of the application of the FDA. It goes further, however, in denying

plaintiff the right to a remedy from the government under the provisions of the FTCA under the *Feres* decision.

In all candor, I find it extremely difficult to rule that plaintiff may avail himself of compensation benefits which cover his hospitalization costs and a sixty percent (60%) service-connected disability and little else. Yet, in view of the *Feres* case and numerous other authorities cited herein, the court finds no alternative.

Accordingly, the United States' motion for summary judgment is granted. Counsel will submit an appropriate order.
DATED: August 1, 1975.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-2142/3

JIMMIE DALE THOMASON,
Appellant in No. 75-2142,

v.

JOHN H. SANCHEZ, GOVERNMENT EMPLOYEES INSURANCE COMPANY, a Corporation, and UNITED STATES OF AMERICA
(D.C. Civil Action No. 74-1831)

JIMMY DALE THOMASON

v.

JOHN H. SANCHEZ, DOROTHY E. SANCHEZ and UNITED STATES OF AMERICA
(D.C. Civil Action No. 74-1832)

JIMMY DALE THOMASON

v.

JOHN H. SANCHEZ and UNITED STATES OF AMERICA
(D.C. Civil Action No. 75-408)

JIMMIE DALE THOMASON

v.

JOHN H. SANCHEZ and DOROTHY E. SANCHEZ
(D.C. Civil Action No. 75-840)

JIMMIE DALE THOMASON,
Appellant in No. 75-2143.

Appeal from the United States District Court
for the District of New Jersey

Argued May 3, 1976
Before: ALDISERT, GIBBONS and GARTH,
Circuit Judges.

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OPINION OF THE COURT
(Filed July 22, 1976)

ALDISERT, Circuit Judge.

These appeals from summary judgments in favor of defendants emanate from a vehicular collision involving two servicemen on active duty and require us to interpret provisions of the Federal Tort Claims Act and the Federal Drivers Act. We affirm.

Appellant Thomason, a member of the United States Army, was operating his motorcycle on the grounds of Fort Dix, New Jersey on November 30, 1972, when he was struck by an automobile owned and operated by defendant Sanchez, himself a serviceman. Subsequently, Thomason commenced a number of lawsuits seeking compensation for injuries incurred in the collision. The district court has detailed these various actions—now consolidated—and their procedural nuances. 398 F. Supp. 500, 501 (D.N.J. 1975). In the interests of simplicity, the following recitation suffices for our purposes. A common law action, commenced in state court against Sanchez and his wife, was removed to federal court pursuant to 28 U.S.C. §2679(d).[1] Plaintiff filed federal complaints naming variously as defendants Sanchez, his insurer the Government Employees Insurance

1. Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

Company, and the United States. In these federal actions, Thomason sought money damages and other relief, essentially under the Federal Tort Claims Act. 28 U.S.C. §§1346 (b), 2671 *et seq.*

Reluctantly, the district court granted summary judgment in favor of all three defendants. In its view, the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), barred the action against the United States, while the exclusivity provision of the Federal Drivers Act, 28 U.S.C. §2679(b),[2] defeated the claims against Sanchez and GEICO. Thomason now challenges, with varying ferocity, each of these conclusions.

I.

Feres v. United States held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.[3] Injured servicemen were limited to seeking redress through "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." *Ibid.* at 144 (footnote omitted). In so ruling, the Court distinguished its then one-year-old precedent of *Brooks v. United States*, 337 U.S. 49 (1949): "The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of

2. See note 4 *infra*.

3. *Feres* was actually three cases, consolidated for disposition. Read together, the fact patterns disclose the sweep of the *Feres* doctrine. In *Jefferson v. United States* plaintiff had claimed damages for a negligent abdominal operation after which a towel 30 inches long was found still inside the plaintiff's stomach. *United States v. Griggs* was a wrongful death action alleging negligent and unskillful medical treatment by army surgeons. *Feres* also was a wrongful death action alleging negligence in the quartering of decedent in barracks known or which should have been known to be unsafe due to a defective heating plant.

no orders or duty and on no military mission." 340 U.S. at 146. In the instant case, the district court found *Feres*, not *Brooks*, applicable:

> The fact that Thomason was in a "present for duty" status and not on any type of leave or pass, as sworn to in an affidavit by Captain James A. Kerchman, Commander of the Medical Company at Fort Dix, brings plaintiff within the ambit of *Feres*, thereby negating the applicability of the FTCA.

398 F. Supp. at 504.

On appeal, Thomason does not urge that there is a genuine issue as to the material fact of his status at the time of the collision. *See* F.R. Civ. P. 56(c). Moreover, he concedes that "it seems that the *Feres* line of decisions is too firmly entrenched to be dislodged at this time." Appellant's Brief at 9. We previously expressed reservations about the continuing validity of the broad *Feres* doctrine. *Peluso v. United States*, 474 F.2d 605 (3d Cir.)(per curiam), *cert. denied*, 414 U.S. 879 (1973) (three Justices voting to grant certiorari). Upon reconsideration we reiterate that concern; as we noted there, however, we are powerless to jettison *Feres* or to dislodge it sufficiently to create an exception for vehicular collisions involving servicemen. *See ibid.* at 606.

II.

Appellant challenges the judgments as to Sanchez and GEICO on several grounds.

First, he asserts that the Federal Drivers Act, 28 U.S.C. §2679(b)-(e), "operates only to deny plaintiff a *choice* of remedies where there *is* a remedy against the United States." Appellant's Brief at 11. Where, as here, there is no remedy against the United States, the actions against

Sanchez and GEICO should be allowed to proceed. This argument has a first-blush appeal. Indeed, the second sentence of 28 U.S.C. §2679(d), see note 1 *supra*, provides that, if a district court determines that a removed case such as this "is one in which a remedy by suit within the meaning of [28 U.S.C. §2679(b)[4]] is not available against the United States, the case *shall* be remanded to the State court." (Emphasis added.)

The contention, however, is not of first impression. Rather, it has been presented to and rejected by at least three other circuits. *Carr v. United States*, 422 F.2d 1007, 1011 (4th Cir. 1970); *Van Houten v. Ralls*, 411 F.2d 940, 942 (9th Cir.), *cert. denied*, 396 U.S. 962 (1969); *Vantrease v. United States*, 400 F.2d 853, 855 (6th Cir. 1968). These courts are unanimous in holding "that within the meaning of the Drivers Act the Tort Claims Act remedy is 'not available' *only* where the government driver was not acting within the scope of his employment. When the Tort Claims Act remedy is not available for any other reason, the remand provision does not apply."[5] *Carr v. United States, supra*, 422 F.2d at 1011. The reason for this rule lies in the exclusivity provision of 28 U.S.C. § 2679(b), the basic purpose of which was to immunize individual government drivers from the heavy financial burdens and personal liabilities associated with operating

4. The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

5. Conceivably, the Federal Tort Claims Act remedy might be barred by a statute of limitations shorter than that prevailing for the common law, state tort action. In such circumstances it would frustrate the immunizing congressional intent behind 28 U.S.C. §2679(b) to construe 28 U.S.C. §2679(d) as authorizing a remand to the state court for trial on the merits. *Vantrease v. United States, supra*, 400 F.2d at 855-86 n.2.

motor vehicles. A contrary interpretation of the "not available" language in the removal section "would revitalize the common law action. [T]his result would directly contradict the Act's immunizing purpose. . . ." *Ibid.* Moreover, Congress itself has indicated approval of this judicial construction of the exclusivity provision of the Federal Drivers' Act.[6] Accordingly, we confidently join ranks with the Fourth, Sixth and Ninth Circuits.

In this case, the district court was fully cognizant of its duty to make "an independent determination . . . as to whether Sanchez was acting within the scope of his employment." 398 F. Supp. at 504. The court concluded:

> The facts reveal that at the time of the collision Sanchez was operating his own vehicle, returning from procuring change for the use of Annex #1 of the Non-Commissioned Officers' Club at Fort Dix, N.J., of which he was in charge. This finding is substantiated by affidavit of Sanchez of April 3, 1975 indicating that he was within the scope of his employment.
>
> A verified petition for removal has been executed by Maryanne T. Desmond, Assistant United States

6. *See* H.R. Rep. No. 715, 92d Cong., 1st Sess. 16 (1971); S. Rep. No. 776, 92d Cong., 1st Sess. 51 (1971) (proposed amendment to 38 U.S.C. §4116). Using the Federal Drivers' Act as a model, Congress passed legislation immunizing the medical personnel of the Veterans' Administration, 38 U.S.C. §4116 (1970), *as amended*, (Supp. III, 1973), and the Public Health Service, 42 U.S.C. §233 (1970). In these two immunity statutes, however, Congress explicitly stated that the remedy supplanting any common law right of action against the individual government employee was not only that provided by the Federal Tort Claims Act but also any compensation or other benefits provided by the United States where the availability of such compensation or benefits precludes a remedy under the Federal Tort Claims Act. *See* 38 U.S.C. §4116(a); 42 U.S.C. §233(a). Rather than amend the statutory language of 28 U.S.C. §§2679(b) and (d) in the same manner as it amended 38 U.S.C. §§4116(a) and (c) in 1973, *see* Pub. L. 93-82, 87 Stat. 193 (1973), Congress apparently has been content to rely on this judicial construction of the Federal Drivers' Act.

> Attorney, which certifies that defendant John Sanchez was acting within the scope of his employment at the time of the incident out of which the within suit arose. The concomitant result of this petition is to provide an exclusive remedy against the United States for personal injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." 28 U.S.C.A. § 2679(b)

Ibid. at 504-05. Defendant's status, therefore, had the effect of limiting *anyone* injured by Sanchez in his official capacity to a lawsuit under the Federal Tort Claims Act. There could be no separate action against Sanchez individually or against his insurer. *Plaintiff's* status a serviceman—which status eliminated the Tort Claims Act remedy—is simply irrelevant to the foregoing.

Moreover, even were we to adopt a different construction of 28 U.S.C. § 2679(d) and order a remand to the state court, we doubt whether the New Jersey courts would be empowered to afford appellant a remedy. "Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law." *Feres v. United States, supra,* 340 U.S. at 146. We gather, then, that under the Supremacy Clause New Jersey courts would be bound to apply federal law—including both the *Feres* doctrine and 28 U.S.C. § 2679(b).

Appellant's second challenge to the judgments in favor of Sanchez and GEICO asserts that "under the Federal Drivers Act, there should be allowed recovery which is actually against a federal employee's personal automobile liability insurance carrier for coverage of his privately-owned vehicle." Appellant's Brief at 11. We reject this

contention. The reality is that any judgment against GEICO would affect Sanchez, if only in the form of an increased premium. Moreover, we question the desirability and the practicality of formulating a rule of law dependent upon a factual determination—whether or not insurance is involved in the case—which generally is improper for jury consideration.

Appellant's final argument is that the Federal Drivers Act, as applied to him to deprive him of all lawsuit remedies,[7] constitutes a denial of due process. The Fourth Circuit discussed a kindred due process argument at length in *Carr v. United States, supra*:

> Carr next contends that the Drivers Act violates the fifth amendment's due process clause by denying him equal protection. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The deprivation, he argues, results from the fact that abrogation is restricted to accidents which involve motor vehicles. Government employees can sue their co-workers for injuries sustained in any other job-related activity.
>
> The classification which the Drivers Act creates does not penalize the exercise of any constitutional right. As we have held, the right to sue a co-worker does not enjoy constitutional protection. Therefore, the classification need not be justified by "a *compelling* governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969) (emphasis in the original). Nor does the Act

7. As a result of the injuries Thomason received in the collision with Sanchez, the government represented in its brief, the Veterans Administration determined that Thomason had a 60% service-connected disability for which he will receive $277 a month, subject to changes in his condition. Appellee's Brief of Government at 15.

create a "suspect" classification, see, *e.g.*, Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944), or involve a "fundamental" interest. See, *e.g.*, Reynolds v. Sims, 377 U.S. 533, 561-562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, a rigorous standard of review would be inappropriate here. Rather, the statutory classification comes here clothed with a presumption of constitutionality and it "will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed. 2d 393 (1961).

The legislative history to which we have already referred makes it clear that Congress was moved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ. S.Rep. No. 736, 87th Cong., 1st Sess. (1961), reprinted in 2 C.S. Code Cong. & Admin. News 1961, at p. 2784 (1962). We think that the magnitude of the automobile insurance problem justified Congress's separate treatment of this specific problem. Furthermore, as the Supreme Court said in *Silver* in response to a substantially similar argument:

> [T]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none. * * * It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.

280 U.S. at 123-124, 50 S.Ct. at 59. 422 F.2d at 1011-12 (footnote omitted). We adopt this reasoning.

Appellant argues that his case differs materially from Carr's—that he is in a distinct sub-class, that of injured servicemen, upon which the effect of the Federal Drivers Act is not reasonable. Appellant's Brief at 14. We are sympathetic with appellant's position, but not receptive to his argument. It is not the effect of the Federal Drivers Act which renders an unreasonable result. The effect of the Federal Drivers Act—predicated upon *defendant's* status—is to make the Federal Tort Claims Act the exclusive remedy. Rather, it is the effect of the *Feres* doctrine—which turns on *plaintiff's* status—which produces the hardship in this case. And, as we have stated previously, only the Supreme Court can overrule, or modify, *Feres*. *Peluso v. United States, supra,* 474 F.2d at 606.

The judgments of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Jimmie Dale Thomason, Appellant in No. 75-2142 vs.

John H. Sanchez, Government Employees Insurance Company, a Corporation, and United States of America (D.C. Civil Action No. 74-1831).

Jimmie Dale Thomason, vs.

John H. Sanchez, Dorothy E. Sanchez and United States of America (D. C. Civil Action No. 74-1932.

Jimmie Dale Thomason, vs.

John H. Sanchez and United States of America (D. C. Civil Action No. 75-408).

Jimmie Dale Thomason vs.

John H. Sanchez and Dorothy E. Sanchez (D. C. Civil Action No. 75-840).

Jimmie Dale Thomason, Appellant in No. 75-2143.

On appeal from the United States District Court for the District of New Jersey.

Present: Aldisert, Gibbons and Garth, *Circuit Judges.*

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed August 27, 1975 be, and the same are hereby affirmed. Costs are taxed against the appellant.

ATTEST:

/s/ Thomas F. Quinn
Clerk

July 22, 1976